United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7018

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

Appellants

and

STATE OF NEW YORK,

Intervenor-Appellant

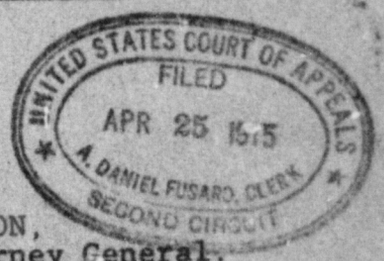
v.

HOWARD H. CALLAWAY,
as Secretary of the Army, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEES



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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7048

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

Appellants

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OPINION BELOW

The unreported opinion of the district court, the Honorable M. Joseph Blumenfeld, appears at pages 42-108 of the Joint Appendix.

JURISDICTION

The judgment of the district court was entered on December 30, 1974 (J. App. 109). Notice of appeal was filed on February 26, 1975 (J. App. 110). This Court's jurisdiction rests on 28 U.S.C. sec. 1291.

ISSUES PRESENTED

1. Whether the district court properly dismissed plaintiffs' claims against the Secretary of the Army under the Federal Water Pollution Control Act Amendments of 1972 for lack of jurisdiction.

2. Whether, where the United States Navy conceived and initiated the dredging project at issue and is now carrying out the project itself, having first obtained a permit from the Army Corps of Engineers, the Navy is the appropriate "lead agency" responsible for the preparation of an environmental impact statement.

3. Whether the Navy's impact statement, which considers all phases of the Navy's own project, must also consider dumping projects contemplated by other agencies in Long Island Sound, as well as the cumulative impacts of such additional projects, where the state of scientific knowledge is inadequate to assess long-term and cumulative impacts and the other projects are remote and speculative.

4. Whether the Navy's impact statement satisfied the procedural requirements of the National Environmental Policy Act of 1969.

5. Whether the decision to dump the dredged spoil at the New London Dumping Ground was arbitrary or capricious.

STATUTES INVOLVED

Pertinent provisions of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. sec. 4321, et seq., and the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. sec. 1251, et seq., are reproduced as Appendix A to this brief.

STATEMENT

This is an appeal by a number of organizations professing concern about environmental matters, from a final judgment dismissing their complaint and denying their request for permanent injunctive and declaratory relief against further dumping of dredged spoil at the New London Dumping Ground.

As part of the national defense program, a new and larger class of attack submarine, Class SSN 688, will be based at the Naval Submarine Base in New London, Connecticut.

These nuclear-powered submarines are currently in production at several locations in the United States. In order for the submarines to be homeported at the New London Base, the Thames River, which connects the Base with Long Island Sound, must be dredged to a new depth and width to accommodate the size of the vessel.

The dredging project, which is being carried out by the United States Navy, is planned in two increments. The first increment involves widening and deepening the lower portion of the Thames, from the mouth of the channel up to the Naval Underwater Systems Center near New London. Dredging for this increment began on August 19, 1974, and is expected to be completed in June, 1975. The first of the SSN 688 submarines is scheduled to make use of this portion of the channel beginning in July, 1975.[1/] The second increment of the project, scheduled to commence in early 1976, involves widening and deepening the channel from the Gold Star Memorial Bridge to the Naval Submarine Base.[2/]

1/ Plaintiffs' statement (Br. 5) that the first submarine is scheduled to arrive at New London in 1976 is misleading. On the contrary, the first submarine will arrive in July, 1975, on schedule, at the Naval Underwater Systems Center, where it will spend several months being "outfitted." Unless the second increment of the project proceeds on schedule, the Navy's plans to take this and subsequent submarines all the way up the channel to the Naval Submarine Base will of course be delayed.

2/ The environmental impact statement contains a map of the project area which identifies the two increments. The map is reproduced at J. App. 408.

The amount of material to be removed from widening and deepening the channel is approximately 2.8 million cubic yards. This material is being dumped at a site in Long Island Sound, known as the New London Dumping Ground, pursuant to a permit issued by the Army Corps of Engineers under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 844, 33 U.S.C. sec. 1344. The New London Dumping Ground is approximately two nautical miles directly off the entrance to New London Harbor and about one-and-one-half nautical miles to the west of Fishers Island. (See Map, J. App. 410.)

Plaintiffs do not object to the dredging project itself. They do object, however, to the use of the New London Dumping Ground as the disposal site. Plaintiffs filed this action seeking to halt dumping at the New London Dumping Ground and to have the dumping permit issued by the Corps declared invalid because of alleged violations of the FWPCA and the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. sec. 4221, et seq.[3/] Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the hearing on plaintiffs' motion for a preliminary injunction was consolidated with the

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3/ Although not a party to the action below, this Court, by order dated February 12, 1975, granted the State of New York permission to intervene on this appeal as an appellant. The State's brief raises essentially the same issues urged by plaintiffs.

trial on the merits. Three days of trial were held, on September 11, 12, and 20, 1974, during which the following facts were developed.

In compliance with NEPA, the Navy prepared a draft environmental impact statement (DEIS) on the project (Ex. 3).[4/] This statement was circulated for comment and filed with the Council on Environmental Quality (CEQ) on April 10, 1972. Although the DEIS gave some consideration to alternative disposal methods, no one method or site was recommended. Instead, the DEIS stated that "final disposition of the dredge spoil, i.e., landfill or sea disposal, is currently under review by the U.S. Army Corps of Engineers and the Environmental Protection Agency. The final disposal site will be incorporated into the final environmental impact statement" (Ex. 3 at 1).

Because of extensive technical comments received on the DEIS, a new draft EIS was commissioned. The Navy hired a private consultant, the Ecosystems Division of Jason M. Cortell and Associates, Cambridge, Massachusetts, to prepare the new draft. The statement, entitled "Revised Draft Environmental Impact Statement" (RDEIS), was released for comment and filed

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4/ The exhibit numbers refer to the number assigned in the trial court. Not all of the exhibits are included in the Joint Appendix, although they are, of course, part of the record.

with CEQ on May 9, 1973. Insofar as disposal is concerned, the RDEIS considered the following alternative methods:

1. Total Land Disposal
2. Part Sea-Part Land Disposal
3. Sea Disposal, Dispersal Sites
4. Sea Disposal, Containment Sites
5. Dredge Spoil Farming
6. Incineration
7. Container Disposal
8. Island Construction

As a result of its study, the RDEIS concluded that sea disposal at a containment site was the most suitable method. A containment site is one in which the dumped material remains in the general area of the dump site. The RDEIS considered three containment sites and concluded that a site in Rhode Island Sound, known as Brenton Reef, was the most desirable from an environmental standpoint.[5/] Dumping in Long Island Sound was not recommended because of previous comments by the Environmental Protection Agency (EPA) and certain general studies indicating that currents in Long Island Sound might tend to move dumped materials shoreward.

5/ The other sites studied are in Block Island Sound. See Ex. 4, Fig. 30, p. 102.

When EPA commented on the RDEIS, however, it noted that passage of Section 103(d) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, 1055, required reevaluation of its original recommendation against dumping in Long Island Sound (Exh. 6B, p. A-2):

> On page 8, the paragraph referring to the Environmental Protection Agency recommendation that a site be selected outside of Long Island Sound should be changed in reference to the new PL 92-532. Section 103(d) of this Ocean Dumping Statute allows for more flexibility in evaluating the economic possibilities available. If no other alternatives are available, then a waiver may be given to exceed the previously published numerical criteria. In investigating alternative dump sites, it should be kept in mind that additional transportation cost of $300,000 for the Rhode Island site might be used for a research project in the selection of a dump site closer to the proposed project. If such a dump site inside Long Island Sound is considered, the State of Connecticut must help evaluate and select a suitable site for disposal in coordination with the Corps of Engineers as specified in Sections 402 and 404 of PL 92-500. The Environmental Protection Agency will evaluate this selection before a final site is specified. Therefore, our original comments relating to site selection should be re-evaluated in regard to new legislation.

Shortly after the RDEIS was issued, the Corps advised the Navy that the New London Dumping Ground should be seriously considered as the disposal site.[6/] At that point, the Corps

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6/ Although the dredging and dumping is totally a Navy project, Section 404 of the FWPCA gives the Corps the responsibility for selecting the disposal site and issuing dumping permits in accordance with its site selection, subject only to a veto power of the Environmental Protection Agency.

had not reached a decision to use New London, but simply wanted the Navy to consider the site. Tr. 137-138. The Corps' recommentation that New London be examined was based on several factors. First, Rhode Island had raised strenuous objections to the use of Brenton Reef (J. App. 368). Second, the Corps questioned the economic feasibility of dumping at Brenton Reef, which is considerably farther from the dredging site than the New London Dumping Ground.[7/] Third, the New London Dumping Ground has been used for disposal of similar materials for at least 40 years with no evidence of degradation of fisheries, water quality, or recreational use (J. App. 351) Fourth, available evidence indicates that dumped material remains close to the point of discharge, i.e., New London is a relative containment site (J. App. 351). Finally, the Scientific Advisory Subcommittee[8/] had no environmental objections to the use of New London, feeling essentially that little was known about the long-term environmental effects of dumping at any

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7/ Dumping at New London is estimated to cost approximately $10 million, as opposed to $17 million if the Brenton Reef site had been selected (J. App. 354).

8/ The Scientific Advisory Subcommittee is part of an Interagency Coordinating Committee on Dredging and Ocean Disposal. It has representatives from EPA, the National Oceanic and Atmospheric Administration (NOAA), the U.S. Fish and Wildlife Service and the Corps.

site and that New London was as desirable a site as any other.

Upon notification of the new proposed site, the Navy prepared an addendum to the RDEIS (J. App. 402-405). The addendum set forth the background for the proposed selection of the disposal site, including a summary of comments of the Scientific Advisory Subcommittee and the basis for such comments.[9/] In addition, the addendum included a report based on empirical data developed by the Navy at the New London Dumping Ground in connection with a 1972 dredging project.[10/] The addendum, including Exhibit J, was circulated for comment and filed with CEQ on August 9, 1973.

As noted, the Subcommittee felt that the state of scientific knowledge as to long-term effects was inadequate to

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9/ The addendum stated that the Subcommittee had "recommended" the use of the New London Dumping Ground. This was technically inaccurate, in that it was the Corps, rather than the Subcommittee, which originally conceived of the idea of using New London. However, the Corps asked the Subcommittee to consider New London and it was the Subcommittee's consensus that New London was the best site. Tr. 290, J. App. 176. At trial, counsel for plaintiffs conceded that the use of the word "recommended" to describe the Subcommittee's role was in good faith and not intended to deceive the public. Tr. 145.

10/ This report was prepared by the Naval Oceanographic Office and was included as Exhibit J to the final environmental impact statement (Ex. 6B in the trial court). Portions of Exhibit J are reproduced in the Joint Appendix.

establish that any other site, including Brenton Reef, was more desirable than New London (Tr. 406-407, 413, 428-429, 451; J. App. 264-265, 271, 286-287, 309). Accordingly, the Subcommittee saw little reason to transport the spoil 30 miles farther east, at great expense and inconvenience, without any indication of environmental gain (Tr. 433, 441-442; J. App. 291, 299-300).[11/]

The expert witnesses at trial generally agreed with the Subcommittee's assessment that the long-term effects of the project simply cannot be predicted. Tr. 229-230, 244-245, 377; J. App. 149-150, 164-165, 235. As to short-term effects, the Government's evidence indicated that the dumped material will be contained at the dumpsite. A primary reason for this conclusion is the nature of the material being dumped. Dr. Richard Smith, of the Naval Oceanographic Office and the principal author of Exhibit J, testified that the material to be dumped is a cohesive, gelatinous and sticky mass, which holds together well. Tr. 302; J. App. 183. He concluded that there was only a small probability of any of the material migrating from the dump site (Tr. 302; J. App. 183). Dr. Smith felt certain that the dumped spoil would still be at the dump site in two years (Tr. 315; J. App. 196). Dr. Bohlen, plaintiffs'

11/ Page 300 of the Joint Appendix appears to have been inadvertently omitted.

principal expert, agreed that the spoil is cohesive and when dumped in a block will stay together. Tr. 214, 244; J. App. 134, 164.

Because of the nature of the material, Dr. Pearce, the chairman of the Subcommittee, felt that currents, upon which plaintiffs rely heavily, were not as significant as they might otherwise be. Tr. 450-451; J. App. 308-309. Nevertheless, the Government also offered the Exhibit J study to show that currents at the New London Dump Site would not adversely affect the containment characteristics of the dump site.[12/] Based on the 1972 study (Exhibit J), the Navy concluded that the "current speeds and directions measured during these investigations indicate that any resuspended sediments would probably remain in the general area of the disposal site." Ex. J, p. 12; J. App. 451.[13/]

12/ The preliminary version of Exhibit J indicated that, based on oil and grease analyses, contaminated sediment dumped in the past may have been scoured out by bottom currents, tides and/or storms. Ex. J, p. 60; J. App. 462. This conclusion has been deleted from the final report, as it was found to be without physical basis and scientifically unsupported. Tr. 306-307; J. App. 187-188.

13/ Like everyone else, the preparers of Exhibit J recognized that conditions occurring over a long period of time could not be predicted on the basis of the available data. Id.

Plaintiffs' experts disputed this conclusion, on the basis of past current studies which indicated a net drift to the northwest, i.e., the Connecticut shore. However, unlike the study represented by Exhibit J, which was confined specifically to the New London site and involved dredged materials from the same area of the Thames as the present project (Tr. 161-162), these other studies were simply in the general area of Long Island Sound. For example, the Hollman and Sandburg current study mentioned in the RDEIS (Ex. 4, Figures 23-25, pp. 87-89) to show that Long Island Sound was a poor disposal area, was conducted eight to nine miles east of the New London Dumping Ground. Tr. 94-95. Similarly, Dr. Bohlen's studies were directed primarily at the New Haven Dump Site rather than New London (Tr. 207; J. App. 127).

Based on Exhibit J's specific data on the dump site, the conclusion in the RDEIS that Long Island Sound was a poor disposal area was deleted from the final EIS (Tr. 121-123). While other areas of the Sound may be poor containment areas, Exhibit J shows that not to be true for the New London Dumping ground.

Public hearings on the proposed permit to be issued by the Corps of Engineers were held on August 28, 1973, in Groton, Connecticut, and on September 11, 1973, in Southold, New York. Problems raised at the hearings as well as comments on the RDEIS were then addressed in the final environmental impact statement

(FEIS), filed on January 7, 1974. The alternative disposal methods set forth in the FEIS are similar to those in the RDEIS and addendum. Again, it was concluded that a relative containment site was the most prudent alternative.[14/] The New London Dumping Ground was recommended as the dumping site. Another site, known as the Acid Site,[15/] located approximately 10 miles southeast of Block Island, was identified as a possible alternate site should dumping at New London have to be curtailed.[16/]

On March 1, 1974, the Corps' Northern Division recommended to its Washington headquarters that a permit be issued for dumping at New London. The Washington office concurred on

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14/ The use of the qualifying word "relative" in the FEIS but not in the RDEIS is of no particular significance. It simply recognizes that no so-called containment site is capable of containing absolutely (Tr. 62).

15/ The site was so named because of the sinking of a sulfuric acid barge there (Tr. 282).

16/ This site, which has never been used for dumping in the past, was first brought to the Navy's attention at the public hearings. After the FEIS was filed, various organizations of fishermen objected vigorously to the Acid Site and it has been dropped from further consideration. Two sites in Block Island Sound are, however, being studied as possible alternate locations. Tr. 390-391; J. App. 248-249.

March 18, 1974. On March 27, 1974, Colonel Mason of the Corps wrote to EPA asking whether EPA would deny or restrict the permit for the New London site pursuant to Section 404(c) of the FWPCA. On April 9, 1974, EPA acquiesced in the use of the New London site, again because the long-term effects of dumping could not be predicted (Tr. 377; J. App. 235), but requested that the following conditions be incorporated into the permit (J. App. 370-371):

1. The disposal operation be conducted as quickly as possible.

2. All disposal occur at a point, marked by a buoy or similar marker, so that a cone-like formation results. The buoy shall be located at 72° 05' 00" W, 41° 16' 08" N.

3. The Corps of Engineers find and begin to study an alternate disposal site prior to the commencement of disposal at the New London site.

4. Upon completion of all disposal of the dredged spoils, the spoils are to be covered with five inches of clean fill.

5. Should an unacceptable adverse impact be detected, the criteria for which are to be set by the Scientific Advisory Subcommittee, the permit shall be summarily suspended or the disposal operation shall be moved to the alternate site.

After an exchange of correspondence between the Corps and EPA (J. App. 363-377), the substance of Conditions 1, 2, 3

and 5 was included in the permit. Condition 4 was felt by the Corps to require further study.[17/] Thus, although not included as a permit condition, it was not rejected and may still be required should the Corps determine it to be necessary (Tr. 382-383; J. App. 240-241).

The Corps issued the permit on April 29, 1974. In addition to the conditions recommended by EPA, the Corps added a condition of its own:

> It is understood that the permittee, prior to commencement of work and subject to the approval of the Division Engineer, will commence a comprehensive monitoring and environmenal effects study which will be funded by the permittee in an amount not to exceed $500,000. The study program will be developed in concert with representatives of Federal and State Governments having an overview of the Long Island Sound region natural resources, and will be administered by the National Oceanographic and Atmospheric Administration under an arrangement acceptable to the Division Engineer. Provisions will be made in the program for participation by a representative segment of the scientific institutions of the Long Island Sound region, for information exchange, and for integration of these studies

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17/ In a letter to EPA dated June 7, 1974, the Corps stated that "[i]nasmuch as the subject of covering dredged materials, let alone locating a source of such materials, has not been brought up during the lengthy review period, its introduction at this stage is presently unacceptable as a permit condition. Even a cursory analysis of the recommended condition Number 4 reveals that its implementation would require the dredging of 500,000 cubic yards of additional material to provide cover. This of itself could be regarded as a major impact and require review under the provisions of NEPA." (J. App. 376.)

> with others of a similar nature now under way or being planned. The permittee will designate a point of contact for purposes of coordinating scientific information and administration of this work. In the event the monitoring and environmental effects study reveals the need to change the manner in which this authorized dredging and disposal activity is being performed this permit may be summarily suspended until the terms and conditions of this permit are modified as appropriate, to effect these changes.

This condition was an outgrowth of the deliberations of the Scientific Advisory Subcommittee. Because of the absence of information as to long-term effects, already discussed, the Subcommittee felt strongly that any dumping project, no matter where located, should be monitored (Tr. 435; J. App. 293). Thus, an important part of the Government's environmental program in connection with this dredging project is the establishment of a scientific monitoring plan which will serve the following purposes:

> (a) To provide for the first time a correlation of actual environmental consequences to be measured against theoretical predictions;
>
> (b) To provide on-site an immediate monitoring of specific consequences relating to this dredging project whereby the Government can act in a timely manner in the event significant adverse effects may occur.

This monitoring program was developed in conjunction with the Scientific Advisory Subcommittee, the Corps, the Navy, EPA, the States of New York and Connecticut, and other members

of the scientific community. Thorough and exhaustive planning for this program has taken place between the fall of 1973 and the present.[18/] The plan was finally approved and funded in June 1974 and has been implemented.

Testimony at the trial by the chairman of the Subcommittee, Dr. Pearce, showed that the monitoring program is underway (Tr. 469-470). In addition, all of EPA's permit conditions, with the exception of Condition 4, are being complied with (Tr. 380; J. App. 238). At anytime indications of adverse effects are noted, Dr. Pearce is to be notified and action will be taken. Thus far, the monitoring program indicates that the water is of good quality one-half mile from the dump site and, after eight months of dumping, the monitors have found a discrete pile of spoil at the site in a conical form (Tr. 526), which is in fact being contained at the site.

After three days of trial, the district court held that it lacked jurisdiction to consider plaintiffs' claims under the FWPCA. As for the alleged violations of NEPA, the court found that "the defendants carry the day in every respect" (J. App. 108). This appeal followed.

18/ The monitoring proposal is Exhibit 20 in this case.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS UNDER THE FWPCA FOR LACK OF JURISDICTION

Plaintiffs alleged that the Corps issued the dumping permit in violation of Section 404(b) of the FWPCA because the project will violate EPA's "Ocean Dumping Criteria," 40 C.F.R. Part 220 et seq.[19/] The district court dismissed this claim for lack of jurisdiction, because of plaintiffs' failure to comply with the 60-day notice requirement of Section 505(b) of the FWPCA. In light of this Court's decision in Vermont Natural Resources Council, Inc. v. Brinegar, 508 F.2d 927 (C.A. 2, 1974), rendered after the district court's opinion, the Government will not press its contention that the 60-day notice requirement is a jurisdictional prerequisite. Nevertheless, we believe that, apart from the 60-day notice provision, Section 505 does not authorize this suit. Section 505 provides, insofar as is relevant:

> Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

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19/ Plaintiffs initially sued EPA as well, alleging (1) that EPA should have denied or restricted the use of the New London Dumping Ground under Section 404(c), and (2) that EPA was required to enforce the five conditions it asked to have included in the permit. Both these claims have been abandoned and need not be considered here.

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

As is plain from the words of the statute, this "citizens' suit" provision applies only to situations where there is an alleged violation of an effluent standard or limitation or an order of the Administrator or a State with respect to such standard. Here there can be no such alleged violation for the simple reason that there is no effluent standard or order to have been violated. See Plan For Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (C.A. 9, 1974), cert. den., U.S. ( ). The only criteria issued to date pursuant to Section 404(b) are the Ocean Dumping Criteria, 40 C.F.R. Part 220 et seq. However, the New London Dumping Ground is in inland waters.[20/] Because of the absence

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20/ The Federal Government has published nautical charts demonstrating that Long Island Sound is inland waters. These charts have been distributed to foreign governments in response to inquiries as to the extent of United States jurisdiction and have been introduced in numerous federal cases as evidence of the United States' position. See Chart 1211 (Ex. 1 in the trial court), one of a set of 155 charts prepared by the Interagency Ad Hoc Committee on Delimitation of United States Coastline. Long Island Sound is also inland waters under the definition found in Section 3(b) of the Marine Protection, Research, and Sanctuaries Act of 1972, Pub.L. No. 92-532, 86 Stat. 1052.

of any EPA criteria for dumping in inland waters, the Corps has voluntarily used the Ocean Dumping Criteria as an interim guide for all situations. These criteria, however, are not binding in any situation except actual ocean dumping (Tr. 397-398; J. App. 255-256). Indeed, it would be extremely unwise to treat them as anything other than advisory since the actual criteria for inland dumping, when finally developed, may be significantly different than the ocean guidelines Certainly, scientific evidence to date indicates that the same considerations reflected in the ocean criteria would not necessarily be applicable to dumping in other locations. See, e.g., FEIS 181; J. App. 436.

Since there is no standard or limitation under the FWPCA to have been violated, this suit cannot be maintained under Section 505 of the FWPCA. Furthermore, Section 505 is the only section in the FWPCA authorizing any private suits in the district courts.[21/] In creating the specifically delimited private rights of action under the FWPCA, Section 505(a) constitutes the exclusive means for private parties to bring suit for actions taken under color of authority of this Act. A recent Supreme Court case is dispositive here. In National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458 (1974), the Court held as follows:

21/ Section 509(b) is a comprehensive provision for judicial review, in the courts of appeals, of actions taken by the Administrator under the FWPCA. Plaintiffs' claim is clearly outside the purview of Section 509(b).

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Botany Mills v. United States, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim--expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

Section 505(e), which preserves the right to seek any other relief under any statute or common law, does not in itself create a right of action and hence cannot confer jurisdiction in this case. Section 505(e) merely preserves prior existing rights which may not, however, under the National Railroad Passenger Corp. holding, quoted above, derive from actions taken pursuant to the FWPCA. See Puget Sound Air Pollution Control Agency v. Veterans Administration Hospital, 4 E.L.R. 20010 (W.D. Wash. 1973); Pinkney v. Ohio Environmental Protection Agency, 375 F.Supp. 305 (N.D. Ohio 1974).

In addition to the fact that plaintiffs' claims under the FWPCA are simply not authorized, they lack merit for several reasons. First, as already noted, EPA's Ocean Dumping Criteria are simply advisory in the context of this case. Thus, whether or not such criteria may be exceeded, there can be no violation by the Corps. Second, plaintiffs overlook Section 404(b)(2) which provides that if the application of EPA criteria would prohibit

the use of a particular site, the Corps is authorized to consider the economic impact of the site on navigation and anchorage. The Corps did exactly that in this case. See letter dated September 27, 1973, from Colonel Mason, Division Engineer, Army Corps of Engineers, to Regional Administrator, Environmental Protection Agency (App. 363-364). Thus, even if the ocean dumping criteria were applicable to this case, they would have been overridden by the Corps' economic determination. See A Legislative History of the Water Pollution Control Act Amendments of 1972, 2 vols. (Congressional Research Service of Library of Congress) 236.

Finally, under Section 404(c), EPA has the authority to deny or restrict the use of any dump site whenever it finds that the use of such area "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." In a letter to the Corps dated April 9, 1974 (J. App. 370-371), EPA stated that it was unable to demonstrate any unacceptable adverse impacts. If plaintiffs disagree with this conclusion, their remedy is to sue the Administrator, since it is EPA, and not the Corps, which is

to make the determination of unacceptable adverse effects. As noted, however, plaintiffs have abandoned their claims against EPA.[22/]

Thus, plaintiffs simply have no claims against the Corps for alleged violations of Section 404. Furthermore, this Court can determine as a matter of law that the Corps has not violated the FWPCA. Under these circumstances, a remand to the district court would serve no useful purpose. Cf. Vermont Natural Resources Council, Inc. v. Brinegar, [illegible] 927 (C.A. 2, 1974).

22/ Although plaintiffs have dropped their claim against EPA, they apparently disagree with the Administrator's interpretation of his authority under Section 404(c). (Br. 12-13). We point out that the Administrator's view, i.e. that he must be able to prove an unacceptable adverse effect before denying site specification, is consistent both with the plain language of the statute and the legislative history. The House Conferees felt that:

> [A]ny restriction or prohibition of any defined area as a disposal site must be made with circumspection in view of the importance of navigation and waterborne commerce to the economic well-being of the United States. Thus, it is expected that disposal site restrictions or prohibitions shall be limited to narrowly defined areas where it can be clearly demonstrated that the discharge of dredged material at such specified location will have an unacceptable adverse effect on critical areas intended to be protected. [Emphasis added.]

A Legislative History of the Water Pollution Control Act Amendments of 1972, (Vol. 2 of 2 vols., Congressional Research Service of Library of Congress) 236.

75-7048

CASES

[illegible] 401 U. S. 402 (1971)

Conservation State v. Southern Vermont v.

[illegible] F.2d [illegible]. 7 ERC 1836

[illegible] 54 Cal. App. 3d 721

[illegible] Valley Transportation Assn v. State [illegible]

[illegible] 22 F.2d 693 (C. A. 1955)

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Br ton Reef, of course, ' been the prime proposal in the revi EIS; and the st t had been carried out there well as the e ow currents, and the lon of proven cont clearly made it an environm ractive optic A. 3 383, 386-8; Exh. 21]. Yet in e discussio ves in the final El as dropped out altogether. This was convenient for the Navy because it ant that a direct comparis enton Reef and never had to be made; but it ef the public and -makers essentially k. For thou such a direct comparison, there was nc ndicate in s that another and, from the onmental viewpoint rently superior containment available; and nothing which forced the l to lain the choic longer locale on a scienti

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Section 5 ricted to alleged violations of "effluent stand and in its view, the Corps' failure to comply with the Ocean Dumping Criteria do not involve such a violation r t Brief, pp. 19-21].

ment's reasoning is not entirely clear, but appears t in part on the view that the Ocean Dumping Criteri were admittedly applied by the Corps in this case a ied on a volunt and thus cannot be fluent standards. do not see the logic i position. However, whe not it is corre t. For even if pla 4 claim could not be maintained as a citizens' Section 505, d be asserted, and th ict Court had jurisdiction, under the Adminis t re Act [5 U.S.C. § the basic Federal jurisdictional statutes [e.g., 28 S 31]. This Court, i d, so held in Conservati , supra, noting, am hings, that Section 505(e) preserves all private rights to sue under any common law.

Ce ment disregards th n Conservation Society a avoid the i n 505(e) by referri recent Supreme Court case of National Railroad orp. v. National Ass'n of Railroad Passengers,

414 U.S. 453, 94 S.Ct. 690 (1974). According to the Government, this case stands for the proposition that a section like 505 of the Water Act is the "exclusive means for private parties to bring suit for actions taken under the color of authority of the Act." [Brief, p. 21]. In fact, this is not so.

All that the National Railroad Passenger case stands for is that in respect of the Amtrak, the citizens' suit provision contained there is the only basis for suit. But in this respect, the Court expressly noted that there was no provision outside of the Amtrak Act granting jurisdiction for private suits [414 U.S. at ____, 94 S. Ct. at 692], whereas in the instant case, the Administrative Procedure Act (which is not applicable to Amtrak) provides an independent basis for suit against the Corps for any violation of law. In addition, Section 307(a) of the Amtrak law was narrowly drawn to allow private actions only in connection with labor agreements, and the legislative history of the law reflected the specific rejection of a broad right of private action [414 U.S. at ____, 94 S.Ct. at 692-695]. By contrast, as this Court noted in Conservation Society [508 F.2d at 938], the legislative history of both the Water Act and Clean Air Act (upon which Section 505 was based) clearly indicate that the citizens' suit provisions were not intended to narrow any rights that would otherwise

be available.*

The Government's argument that the Corps cannot be faulted because the Ocean Dumping Criteria were purposefully applied on a voluntary basis is also lacking in merit. In the first instance, Section 304(h) authorizes the granting of dumping permits only in accordance with environmental guidelines developed by EPA. The Ocean Dumping Criteria were and are the only such guidelines yet adopted, and those were handily operative on a voluntary basis. Furthermore, even if the Ocean Dumping Criteria had not been officially binding, the Corps expressly made them so in this case and held them out as the basis for the issuance of the permit [A. 366]. Under those circumstances, the Government cannot claim that the criteria could be freely violated [see, e.g., United States v. Republic Steel Corp., 362 U.S. 482, 490 (1960); Federal Housing Administration v. Darlington, 358 U.S. 84, 90 (1958); Feliciano v. Laird, 426 F.2d 424, 429 (2d Cir. 1970); Smith v. Resor, 406 F.2d 141, 145-46 (2d Cir. 1969)].

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* It would be ironic indeed if Section 505 were read to foreclose a suit against the Corps under the APA for Water Act violations since, but for Section, such a suit would clearly lie. Congress can hardly have intended such a result. For example, section 404, involving, as it does, Corps action very much a case of its own that does not fit easily the definition of "effluent standard" contained in section (f). Accordingly, if there were no remedy outside of the Water Act for Corps' violations, there could well be no remedy at all -- a situation which the Courts generally do not regard with approval.

Index cont'd

Cases:

Statutes and Regulations:

* However much the Government attempts to build up the Navy's role vis-a-vis its consultant at the hearing below, Lt. Way, the Navy officer responsible for the EI[illegible] early stated that he acted in an editorial ca[illegible]ity only, and did not concern himself with the conte[illegible] of the consultant's work [Tr. 198-200; A. 121-231].

[illegible] trial on the merits. It was day of trial were held on September 11, 12 and 13, 1974, during which the affidavits were examined.

In compliance with NEPA, the Navy prepared a draft environmental impact statement (DEIS) on the project (i.e., the [illegible] that has already been [illegible]). This statement was circulated for comment and filed with the Council on Environmental Quality (CEQ) on April 10, 1974. Although the DEIS gave some consideration to alternatives to the proposal [illegible] no alternative was recommended. Instead, the DEIS stated that the site [illegible] was adequate [illegible] i.e., Law Fill or an alternate, is currently under review by the U.S. Army Corps of Engineers and the Environmental Protection Agency. The final disposition [illegible] will be incorporated into the final environmental impact statement (Exhibit 1).

[illegible] of alternative technical [illegible] were raised in the DEIS, a new draft EIS was commissioned. The Navy hired a private consultant, the Ecosystems Division of Jason M. Cortell and Associates, Cambridge, Massachusetts, to prepare the new draft. The statement, entitled "Revised Draft Environmental Impact Statement" (RDEIS), was released for comment and filed [illegible] EIS. All that the [illegible] the [illegible]

4/ The exhibit numbers refer to the number assigned in the trial court. Not all of the exhibits are included in the Joint Appendix, although they are, of course, part of the record.

When EPA commented on the RDEIS, however, it noted that passage of Section 103(d) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, 1055, required reevaluation of its original recommendation against dumping in Long Island Sound (Ex. 58, p. A-2):

> On page 8, the paragraph referring to the Environmental Protection Agency recommendation that a site be selected outside of Long Island Sound should be changed in reference to the new PL 92-532. Section 103(d) of this Ocean Dumping Statute allows for more flexibility in evaluating the economic possibilities available. If no other alternatives are available, then a waiver may be given to exceed the previously published numerical criteria. In investigating alternative dump sites, it should be kept in mind the additional transportation cost of $3[illegible] 000 for the Rhode Island site might be used for a research project in the selection of a dump site closer to the proposed project. If such a dump site inside Long Island Sound is considered, the State of Connecticut must help evaluate and select a suitable site for disposal in coordination with the Corps of Engineers as specified in Sections 402 and 404 of PL 92-500. The Environmental Protection Agency will evaluate this selection before a final site is specified. Therefore, our original comments relating to site selection should be re-evaluated in regard to new legislation.

Shortly after the RDEIS was issued, the Corps advised the Navy that the New London Dumping Ground should be seriously considered as the disposal site.[6/] At that point, the Corps

6/ Although the dredging and dumping is totally a Navy project, Section 404 of the FWPCA gives the Corps the responsibility for selecting the disposal site and issuing dumping permits in accordance with its site selection, subject only to a veto power of the Environmental Protection Agency.

failed to use New London, but simply wanted the site. Tr. 137-138. The Corps' recommendation that New London be examined was based on several factors. First, Rhode Island had raised strenuous objections to the use of Brenton Reef (J. App. 368). Second, the Corps questioned the economic feasibility of dumping at Brenton Reef, which is considerably farther from the dredging site than the New London dumping ground. Third, the New London Dumpsite has been used for disposal of similar materials for at least 40 years with no evidence of degradation of fisheries, water quality, or recreational use (J. App. 35). Fourth, the evidence indicates that dumped material remains close to the point of release, i.e., New London is a relatively contained site (J. App. 352). Finally, the Scientific Advisory Subcommittee[8] had no environmental objections to the use of New London, feeling essentially that little was known about the long-term environmental effects of dumping at any

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7/ Dumping at New London is estimated to cost approximately $10 million, as opposed to $17 million if the Brenton Reef site had been selected (J. App. 354).

8/ The Scientific Advisory Subcommittee is part of an Interagency Coordinating Committee on Dredging and Ocean Disposal. It has representatives from EPA, the National Oceanic and Atmospheric Administration (NOAA), the U.S. Fish and Wildlife Service and the Corps.

of the scientific community. Thorough and exhaustive planning for this program has taken place between the fall of 1973 and the present. The plan was finally approved and funded in June 1974 and has been implemented.

Testimony at the trial by the chairman of the Sub-committee, Dr. Pearce, showed that the monitoring program is underway (Tr. 469-470). In addition, all of EPA's permit conditions, with the exception of condition 4, are being complied with (Tr. 280; J. App. 238). At anytime adverse effects are noted, Dr. Pearce is to be notified and action will be taken. Thus far, the monitoring program indicates that the water is of good quality one-half mile from the dump site and, after eight months of dumping, the monitors have found a discrete pile of spoil at the site in a conical form (Tr. 526), which is in fact being contained at the site.

After three days of trial, the district court held that it lacked jurisdiction to consider plaintiffs' claims under the FWPCA. As for the alleged violations of NEPA, the court found that "the defendants carry the day in every respect" (J. App. 108). This appeal followed.

18/ The monitoring proposal is Exhibit 20 in this case.

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[illegible]lead that the Corps [illegible]mping

[illegible]n violation of Section 404(b) of the FWPCA because the

project will violate EPA's "Ocean Dumping Criteria," 40 C.F.R.

Part 220 et seq.[1/] The district court dismissed this claim for

lack of jurisdiction, because of plaintiffs' failure to comply

with the 60-day notice requirement of Section 505(b) of the FWPCA.

In light of this Court's decision in Vermont Natural Resources

Council, Inc. v. Brinegar, 508 F.2d 927 (C.A. 2, 1974), rendered

after the district court's decision, the Government will not press

its contention that the 60-day notice requirement is a juris-

dictional prerequisite. Nevertheless, we believe that, apart

from the 60-day notice provision, Section 505 does not authorize

this suit. Section 505, as far as is relevant:

Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

[illegible]

[1/] [illegible] plaintiffs initially sued EPA as well, alleging (1) that EPA should have denied or restricted the use of the New London Dumping Ground under Section 404(c), and (2) that EPA was required to enforce the five conditions it asked to have included in the permit. Both these claims have been abandoned and need not be considered here.

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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

As is plain from the words of the statute, the citizens' suit provision applies only to situations where there is an alleged violation of an effluent standard or limitation or an order of the Administrator or a State with respect to such standard. Here there can be no such alleged violation for the simple reason that there is no effluent standard or order to have been violated. See Plan For Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (C.A. 9, 1974), cert. den., ___ U.S. ___ (___). The only criteria issued to date pursuant to Section 404(b) are the Ocean Dumping Criteria, 40 C.F.R. Part 220 *et seq.* However, the New London Dumping Ground is in inland waters.[20/] Because of the absence

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20/ The Federal Government has published nautical charts demonstrating that Long Island Sound is inland waters. These charts have been distributed to foreign governments in response to inquiries as to the extent of United States jurisdiction and have been introduced in numerous federal cases as evidence of the United States' position. See Chart 1211 (Ex. 1 in the trial court), one of a set of 155 charts prepared by the Interagency Ad Hoc Committee on Delimitation of United States Coastline. Long Island Sound is also inland waters under the definition found in Section 3(b) of the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052.

should not expand the coverage of the statute [illegible]

Control Act (33 U.S.C. § 1251 et seq.) to restrain the defendants from dumping large amounts of highly toxic dredged river bed spoil in Long Island Sound. The State of New York is extremely concerned that the procedural requirements of the National Environmental Policy Act have been undermined by the course of conduct pursued by the Army Corps of Engineers and the United States Navy in this case and that these actions which are in violation of § 404 of the Water Pollution Control Act (33 U.S.C. § 1344) pose a serious danger to the health and environment of the People of the State of New York through the destruction of fisheries and shellfish beds and the risk of pollution to the beaches of Long Island.

Questions Presented

1. Whether denial of relief under the Federal Water Pollution Control Act was proper strictly on the basis of early suit by plaintiffs under that statute.

2. Whether the Court below improperly sanctioned the failure by the Navy to consider the cumulative impacts of spoil disposal in Long Island Sound.

3. Whether the NEPA review process was undermined by the following procedural violations:

a. The Army's violation of NEPA committed when it delegated responsibility to draft an environmental impact statement to the Navy and the further violation

by the Navy's redelegation of the drafting to an outside firm of consultants with no participation by the Navy or Army in drafting.

b. The projection to the public of a distorted image of the scientific considerations involved in the site selection process.

c. The change in site selection being made without supportive data and the subsequent issuance of an amended impact statement as a mere technicality.

4. Whether there was an adequate consideration of alternative dumping sites in the final environmental impact statement.

The Decision Below

The District Court (Blumenfeld, D.J.) found the plaintiffs to have no claim under the Water Pollution Control Act 33 U.S.C. § 1251 (Supp. 1972) because of a failure to comply with notice requirements under that statute. The plaintiffs were found to have standing to sue under the National Environmental Policy Act 42 U.S.C. § 4321 et seq. (1973). However, the District Court concluded that there had been no violation of that statute by defendants. All requests for relief, preliminary and permanent, were denied.

Statement of Facts

This litigation involves the insistence of the defendant United States Navy that it dump large quantities of dredged spoil in Long Island Sound and its refusal to fully comply with NEPA prior to doing so. The dredging is necessitated by the introduction of a new class of submarine, the SSN 688, a large nuclear-powered attack vessel. The first SSN 688, originally scheduled for transport from Virginia to New London in July 1975, is not now expected until January 1976 (A. 40),* a fact demonstrating a lack of urgency which is not reflected in the District Court's decision. The second and subsequent SSN 688's are to be built by the Electric Boat Division of General Dynamics in Groton, Connecticut on the Thames and delivered to the Navy at later dates. To accommodate these submarines the Navy has devised a dredging project to deepen and widen the Thames River above New London for approximately 7.5 miles. New York and the original plaintiffs, in no way challenge the necessity for stationing the SSN 668's at the New London submarine base. It is the method chosen for disposal of the dredged spoils which lies in dispute, not the dredging itself.

* Numbers preceded by "A" refer to pages in the Appendix.

The first section of dredging, now under way, will enlarge the Thames Channel from Long Island Sound to the Underwater Systems Center where the new submarines will be temporarily berthed while being equipped. The second and larger section of the dredging, to extend upstream from the Underwater Systems Center to the Submarine Base itself, will take approximately one year to the completed. Work on this section is scheduled to commence in January 1976. (Plaintiffs' Exh. 20, p. 1). It is important to note that the Army has a large dredging project of its own scheduled for later in the 1970's. It will deepen the Thames from the Navy's proposed depth of 37' to 40'. (Plaintiffs' Exh. 15).

The dredge spoils, which consist of approximately 2,800,000 cubic yards of river bottom, are seriously polluted, as the District Court itself found (A. 44, 490-491). The Army Corps of Engineers determined the dredge spoils to be unsuitable for open water dumping under applicable criteria established by the United States Environmental Protection Agency. (See Letter dated March 27, 1974 from Army Corps to EPA Regional Administrator, Defendants' Exh. E).

The site selected by the Army Corps of Engineers for the dumping of this polluted material is presently a section of Long Island Sound only a mile and a half offshore of Fishers

Island, New York. The primary danger inherent in this plan is that the spoils so dumped into the productive waters of the Sound will inevitably be dispersed by current patterns to the coast of Long Island and Fishers Island, polluting estuaries, tidal wetlands, nursery grounds for fish, shellfish and other marine life (A. 475-496, 422-425). The impact of such a dispersal of pollutants is imminent, not remote. Its effect would be direct and devastating on both the public health and the economy of the State. Contrary to the finding of the District Judge, there is not one scintilla of evidence on the record that would show there to be any long or short-term benefit to the Thames by the dredging project which would offset the hazards threatened by disposal of the spoil in areas such as those permitted by the court below.

The events which led up to the issuance of a permit to the Navy for the dumping operations at the New London site find their origin in the Navy's Draft Environmental Impact Statement issued in January 1972 (Plaintiffs' Exh. 3). At that time no site in Long Island Sound was given more than cursory consideration. In fact, in that draft the Navy explicitly stated its intention to dispose of the spoils at least 23 miles from the coastline. (Id., p. 1-3). This intention was restated more specifically in the Revised Draft

Environmental Impact Statement in which the Navy revealed the Brenton Reef Dumping Ground off Providence, Rhode Island as its target for the spoils. That revised draft was written for the Navy by a private firm of consultants. At no time did the Navy question the content, accuracy or conclusions of the firm's work. The Navy's participation in the drafting was, as its own officer testified, no more than that of a stylistic editor (A. 121-123). The consultants concluded that due to the toxic nature of the dredged materials and the lack of available data as to its danger to marine life, the spoil should be placed in a containment site. Brenton Reef was a site of proven suitability which had received 8.2 million cubic yards of dredge spoil between 1967 and 1970. Monitoring of the site and informal discussions with the Army Corps of Engineers revealed that the site had good containment characteristics and the capacity to take on the full load of the Navy's Thames River spoils (A. 379, 381). As the impact statement noted "The choice of this site was an outgrowth of... further investigation into the physical, chemical and biological characteristics of... Eastern Long Island Sound." (A. 381)

On June 26, 1973, the Army Corps of Engineers responded to the Navy's request for permission to dump at Brenton Reef by directing the Navy to abandon that selection and instead

utilize the New London Dumping Ground, a site which has currents with three times the force of those at Brenton Reef (Plaintiffs' Exh. 20, p. 14). As Mr. Andreliunas of the Corps stated "Consideration of the New London site for dumping was based on economics, on rather sketchy information regarding sediment transport and on the fact that it has previously been used for this purpose." (A. 499-500)

The Navy promptly amended its impact statement in July 1973 so as to reflect the Army Corps' new decision to have the dumping occur at the New London site (A. 402-405). The Addendum issued by the Navy and released to the public clearly stated that the choice of New London was the result of the recommendations of the Scientific Advisory Committee of an Interagency Coordinating Committee on Dredging and Ocean Disposal. That Committee was comprised of representatives from numerous federal agencies and it is implied by the Navy that the recommendation of the New London site was a full "Committee" recommendation (A. 404-405). It was later revealed that the recommendation was not unanimous and in fact the Committee's function was only to advise, not to rule on project proposals (A. 36-37).

New York State's opposition to the selection of the New London site as expressed at the public hearings on the Revised Draft EIS was based primarily on its concern for the stability of the entire Long Island Sound ecosystem -- its fisheries, shellfish beds, beaches and wetlands. Concern was also voiced by New York as to the cumulative impact of the Army's own plan to utilize the site for its own Thames spoils. One of the major objections to the procedure followed by the Army and Navy up to the point of the hearings, was the utter disregard for the position of the State of New York and the total failure to even consult or elicit comments from the State. Nonetheless the State voiced its opposition to the use of Long Island Sound on a number of occasions, clearly stating its concern over the long-term impacts of the dumping. (Plaintiffs' Exh. 63, "App. B", pp. 56-71).*

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* In a letter to the defendant-Administrator of the Federal EPA dated October 4, 1974, the Commissioner of the New York State Department of Environmental Conservation asked the EPA to withdraw its specification of the New London Disposal Site stating that

> "...the continued discharge of dredge spoil by the United States Navy into this area will have an unacceptable adverse effect on shellfish beds and fishing areas (including spawning and breeding areas), wildlife and recreational areas."
>
> "The Navy and the Corps of Engineers have provided criteria for monitoring ... water quality standards. [Previously we] asked that before dumping began 'measures be undertaken immediately ... by which contravention of these criteria may be rapidly detected, discussed and acted upon. We feel that such procedures must be

*Footnote Continued

developed prior to the commencement of dredging and dumping activity'. The Corps of Engineers [has] declined to follow the State's request."

"More importantly, however, no one knows what the long term effect will be on the Long Island fisheries and wildlife and recreational areas as a result of dumping this very large amount of dredged spoil... ."

Despite the fact that other sites outside of Long Island Sound were found acceptable by the EPA subject to testing (A. 365), the Final Environmental Impact Statement released by the Navy in January 1974 designated New London as the dumping site. Brenton Reef, the proven site found to be environmentally desirable in the prior EIS drafts because of its good containment characteristics, was omitted altogether (A. 407-414).

The Army issued the work permit to the Navy on April 29, 1974. On June 26, the work contract was awarded by the Navy with actual dredging and dumping beginning on August 19, 1974. Thereafter plaintiffs brought this action, moving for preliminary injunction and seeking a permanent injunction as well. After hearings which, by stipulation, were to constitute the full scope of evidentiary proceedings for both preliminary and permanent relief, the court decision was issued on December 13 denying all relief and judgment entered on December 30. The State of New York petitioned this Court for leave to intervene which request was granted on February 12, 1975.

I

THE DISTRICT COURT'S REFUSAL TO RECOGNIZE PLAINTIFFS' CLAIM TO JURISDICTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT IN THE ABSENCE OF A "PERSUASIVE REASON" WAS AN IMPROPER BAR TO JUDICIAL REVIEW UNDER THAT STATUTE.

Plaintiffs allege a violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereafter "FWPCA") in that

I. because of the violations of NEPA underlying the Army's issuance of a permit for the dumping under § 404 of the Act, the permit itself must fail, and

II. the permit was issued in violation of the applicable EPA criteria and is therefore fatally defective.

The District Court's refusal to review these claims, stating that plaintiffs were barred by the 60-day notice provision of the FWPCA (33 U.S.C. § 1365[b][1][A]), was hypertechnical and unwarranted.

This Court has refused to take such a pedantic approach to the 60-day provision. See Conservation Society of So. Vt. v. Secretary of Transp., ___ F. 2d ___ (Dec. 11, 1974), slip opinion at 718:

> "After careful consideration we are not persuaded that Congress intended the sixty-day notice provision to erect an absolute barrier to earlier suit by private citizens under FWPCA."

This Court held in the Conservation Society case that a "crabbed construction of Section 1365 would ... elevate the 60-day rule to the position of an absolute barrier to earlier suit ... [T]his would fail to account for § 1365(e), which preserves all private rights to sue for relief under any statute or common law." Id., slip opinion at 718, note 62.

Turning to the merits, we share plaintiffs' concern that the criteria established by the EPA for such dumping projects were violated in issuing the permit to the Navy thereby allowing placement of dredge spoil where it is likely to work irretrievable harm.

The EPA is authorized by § 404(b) of the Act to issue ocean dumping regulations which are to serve as guidelines for the Army Corps of Engineers' decisions on the issuance of permits. 38 Fed. Reg. 28610 (October 15, 1973). The regulations, in effect during the period in question, were expressly recognized by the Army as being applicable to the Thames River spoils (A. 366-367). Samples of the dredging area exceeded

these EPA guidelines for numerous concentrations of various substances (A. 44). Those regulations 40 C.F.R. § 227.64(a)(2) state that the disposal site for polluted spoils must be located where disposal operations

> "will cause no unacceptable adverse effects to known nursery or productive fishing areas. Where prevailing currents exist, the currents should be such that any suspended or dissolved matter would not be carried in to known nursery or productive fishing areas or polluted or shoreline areas."

It was demonstrated at the trial that the areas in the vicinity of the dump site are highly productive nursery and fishing areas (A. 248-253, see also testimony of Bohlen, Sept. 12, 1974). The Final Environmental Impact Statement itself demonstrated that the currents in the New London dumping ground have an overall effect of drifting into the areas protected by the EPA guidelines (A. 441-457). Significantly, the defendants' own brief (p. 12) in the District Court conceded that "[t]he problem of long-term containment is not addressed in detail in the EIS, ... the EIS at 2.11C does indicate that some drift is likely over the long-term".

The Army's decision to issue a permit for dumping at the New London site violated § 404 of the FWPCA and applicable regulations and for that reason alone was invalid.

II

THE DEFENDANTS' FAILURE TO EVALUATE THE CUMULATIVE IMPACTS OF SPOIL DISPOSAL IN LONG ISLAND SOUND CONTRAVENED NEPA REQUIREMENTS FOR FULL ANALYSIS OF ENVIRONMENTAL IMPACT.

The District Court determined that the Navy's Thames River Project is a single dredging operation unrelated to any other, that it is "isolated", and that its impact upon Long Island Sound should be viewed in an isolated context. We should, according to the lower Court, blind ourselves to all other spoil disposal projects in the Sound. This was reversible error.

As pointed out in the District Court, there are a number of proposed dredging projects which will generate significant amounts of spoil in the New London vicinity over the next few years. The Army's proposal to re-dredge the Thames is the largest; it alone will produce 1,400,000 cubic yards of polluted material from the same source as the Navy project. The Army is already considering, not surprisingly,

New London as the disposal site (Plaintiffs' Exh. 15). The District Court preferred to categorize this fact as "entirely a matter of speculation" and thus in effect ignore it (A. 70). Yet all told more than 13,000,000 cubic yards of spoil may be dumped in the Sound over the next decade. This figure does not include the 5,000,000 cubic yards presently slated for the New London site alone, consisting of 2,800,000 from the Navy, 1,400,000 from the Army, 300,000 from the Coast Guard, 300,000 from the Electric Boat Co. at Groton, and 200,000 for maintenance (Plaintiffs' Exh. 16, see also Stipulation on Record September 20, 1974).

The Final EIS is devoid of any consideration whatsoever of other dumping in Long Island Sound; it did not even mention the Corps of Engineers' proposal to dredge and dump at the same sites.

For these reasons the New York Commissioner of Environmental Conservation emphasized to the Army and the Navy at the public hearings on the project in September, 1973 that Long Island Sound must be considered as a "total ecosystem and, therefore, the impact of all proposed spoil operations should be assessed together" (Plaintiffs' Exh. 6A, "App. A", p. 45). Without such a broad overview dredge spoil will repeatedly be dumped into the Sound without regard for other dumping activities throughout the Sound.

The guidelines of the Council on Environmental Quality, with whom impact statements are filed, require that federal decision-makers consider the "overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. * * * In many cases, broad program [impact] statements will be required in order to assess the environmental effects of a number of individual actions in a given geographical area". 40 CFR § 1500.7(d) (emphasis supplied). Remarkably to the point are the Navy's own regulations implementing NEPA procedures, which state in part,

> "[A] large overview should be maintained toward the magnitude of environmental effects, both of the immediately contemplated action and future actions for which the proposed action may serve as a precedent or have a cumulatively significant impact." OPNAVINST 6240.2c, 1b (October 4, 1972) (emphasis supplied).

This Court in the Conservation Society case (Slip opinion at 711) expressly noted the appropriateness of ordering impact statements to analyze the issues with such a broad overview. The actions threatened in this case as in Scientists' Institute for Public Information v. AEC, 481 F. 2d 1079 (D.C. Cir., 1973), require "irreversible and irretreivable commitments of resources" which will in themselves curtail

subsequent broadscale assessment of alternatives. It is clear as well, as this Court found in the Conservation Society case (at 712), that no "overall impact statement is likely to emerge spontaneously" from either the Army or the Navy. Unless consideration of the cumulative impacts of proposed spoil disposal in the Sound is ordered in this case, such an analysis will probably never occur. The Sound and its fisheries and other irreplaceable resources will be subject to seemingly isolated incremental impacts, some more severe than others but together devastating. This Court's holdings on the impact of "isolated" projects are most applicable to the project at hand. Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir., 1972).

The District Court's attempt to distinguish the Navy dumping from consistent holdings sustaining the requirement for broad impact statements is unpersuasive. The court denied what it described as a "bandwagon effect" here and insisted that the defendants were under no obligation to consider the cumulative effect of successive dumping of other projects (A. 72-74). The District Judge conceded that possibly (A. 74)

> "as each incremental harm is imposed and as the Sound becomes more polluted the need to preserve the purity of the Sound will seem lessened to the next decision-maker."

But he refused to accept the plain implications of this statement, despite the provisions of the Navy's own regulations which require an "overview" of "actions for which the proposed action may serve as a precedent" (emphasis supplied).

The District Court appeared content with the thought that some day a comprehensive study will be done by a multi-state commission (A. 74, 77) -- long after the Sound has been destroyed by successive assaults on its marine resources. But such a study would be of historical interest only.

For these reasons its denial of relief would jeopardize the productivity and stability of this precious marine resource -- all this not for a constructive project of tangible benefit to the public, but merely for the disposition of dredge spoil.

III

THE MANDATORY PROCEDURES FOR NEPA REVIEW WERE IGNORED BY DEFENDANTS AND THESE VIOLATIONS WHICH UNDERMINED THE VALIDITY OF THE REVIEW WERE WRONGFULLY SANCTIONED BY THE DISTRICT COURT.

The steps for environmental review of a proposed federal project by a decision-maker as prescribed by the National Environmental Policy Act are not optional guidelines

but rather mandatory procedures to be followed scrupulously where applicable. Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir., 1971); Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2d Cir.), cert. den. 409 U.S. 849 (1972); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y., 1972). NEPA procedures do not merely constitute a ritual to be observed in perfunctory fashion without true involvement by federal agencies, for such a deadening interpretation of the statute would totally corrupt the goals intended to be achieved through the process of careful environmental review. In the present case the District Court approved just such a ritualistic approach to environmental review riddled with violations of NEPA.

A. The Army Corps of Engineers wrongfully abdicated its statutory duty to prepare an Environmental Impact Statement To the Permit Applicant. In turn the Navy, as Applicant, wrongfully delegated the task of drafting to an outside firm of consultants with neither federal agency participating in any way in the actual drafting of the Statement.

NEPA explicitly requires each federal agency to do its own detailed statement of the expected environmental impact of major federal actions by it. Greene County, supra, 455 F. 2d at 420. Primary and non-delegable responsibility for the preparation of an EIS is on the responsible official of the

particular agency. 42 U.S.C. § 4332(2)(c). The Council on Environmental Quality requires the evaluation to be the agency's own. 40 C.F.R. § 1500.7(c). This is based on the assumption that federal agencies are vigilant in protecting the public interest. Harlem Valley Transportation Ass'n v. Stafford, 500 F. 2d 328, 335 (2d Cir., 1974); Greene County, supra, at 420.

In the present case the United States Navy, having conceived of a plan to accommodate the implementation of the SSN 688 submarine, sought the required permits and directives from the Army Corps of Engineers. As brought out at trial, the Army was manifestly the decision-maker as to the method ultimately chosen for disposal of the spoils (A. 497-502). Its role is parallel to the role played by the Federal Highway Administration in the deployment of funds for specific highway projects. Conservation Society, supra, slip opinion, p. 695. In each case the seeds of the plan germinated with the particular applicant who then approached the decision-maker for actual directives on specific aspects of a plan. The Army Corps of Engineers is in the best position, as the agency regulating and granting all permits for such dredging and dumping projects, to weigh the costs to the environment and conduct a thorough cost-benefit analysis in each case.

The CEQ Guidelines require that when an agency relies on an applicant to submit environmental information, the agency should not only assist the applicant but "[i]n all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements". 40 C.F.R. 1500.7(c). Yet here, no attempt by the Army to even assist the Navy, let alone draft the EIS, was ever made.

Even were this case to be viewed as one where two federal agencies acted in conjunction to carry out a particular federal project, the Army would still have to be viewed as the "lead agency" under CEQ guidelines, 40 C.F.R. § 1500.7(b), which lists as relevant factors in determining the proper agency to assume responsibility of impact statement preparation -- "the time sequence in which the agencies become involved, the magnitude of their respective involvement, and their relative expertise in regard to the project's environmental effects".

When the Navy approached the Corps to obtain a permit for the Thames River project it made the Corps the "federal agency" which had primary authority for committing the federal government to a course of action freighted with major environmental impact. It is true that the plan was originally conceived by the Navy and that the Navy would ultimately arrange

to have the project contracted out to the private bidders, but as with Federal Highway Administration in Conservation Society, supra, the decision-maker was in truth the Army. Although the District Court claimed that it had not been proven that the Corps had the "experience" in this field necessary for drafting an EIS on such a project (A. 55), in fact the defendants have never denied the expertise of the Corps in this area.

This unwarranted divorce of federal authorities from active participation in the environmental analysis of the Thames River project was pushed to the point of absurdity when the Navy re-delegated the drafting of the EIS to a commercial firm of consultants, re-delegating itself to the role of editor. The gross lack of regard for what went on in the drafting is set forth clearly on the record.*

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* Mr. Butzel questioning Navy Lt. Charles T. Way on September 12, 1974, Tr. 198-200:

"Q. I'm frankly interested in who wrote the various sections of these reports. That's what I'd like to know.

A. If you mean by 'wrote' the primary guy or the person who --

Q. No. Was it you or was it Ecosystems?

A. It was Ecosystems.

Q. That's the case with the entire Impact Statement?

A. Yes, of course, I revised it and made comments and suggestions, or perhaps changed the wording in a few places; but, you know, that's a typical editorial feature.

Q. You were just acting as an editor in that case?

A. Very definitely.

* * *

THE COURT: Were you concerned about the content, of the accuracy of the content?

THE WITNESS: No. As I considered them highly professional, I wasn't going to be questioning their content or the accuracy of the professional documents that they were using and their conclusions from them."

The District Court tried to distinguish this case from Greene County and the other cases cited by plaintiffs on this point on the ground that in those cases the statements were prepared by the proponents of the projects. But there are more important reasons for prohibiting such an abdication. In Sierra Club v. Lynn, 502 F. 2d 43, 59 (5th Cir., 1974), the Court held:

> "NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgemental functions, and participate actively and significantly in the preparation and drafting process."

In one case where an outside firm did help prepare an EIS with the Court's subsequent approval that Court stated that the agency involved had "actively participated in all phases of the EIS preparation process". Life of the Land v. Brinegar, 485 F. 2d 460, 467 (9th Cir., 1973). It was this active participation, not present in the case at bar, which the Court stated precluded it from concluding there was any improper or illegal delegation. Id. at 468. There is no need to discuss the possibility that in addition to this lack of participation by the federal agencies in drafting there was a self-serving

interest of the consulting firm, for example in future contracts. "Nothing short of 'genuine' federal preparation of the EIS accords with Greene County." Conservation Society, supra, slip opinion at 705. Nor do the "compelling reasons" of economy and shortages of personnel described by the Judge below justify delegation to outside firms. This Court has only recently stated that this problem of shortages of both general and expert personnel "is best addressed to Congress". Conservation Society, supra, slip opinion at 706, note 24.

B. The EIS totally distorted the findings of the Scientific Advisory Committee to whom the Navy turned in hopes of resolving its dilemma.

The Navy's original Draft EIS issued in January, 1972 made clear its intention to dispose of the Thames spoils at a sizeable distance from Long Island Sound (Plaintiffs' Exh. 3). This was reinforced by the Revised Draft EIS which designated Brenton Reef as the most suitable site for dumping (A. 379, 381). This was supported by 6 years of monitoring data which demonstrated steady containment at that site. When the Navy met with opposition from the Corps of Engineers, which directed it to abandon Brenton Reef in favor of the New London site -- despite a 1/2 year study which showed that long-term containment was an uncertainty at New London (A. 451) -- the Navy sought the views of the Corps' Scientific Advisory Committee. This interagency committee, comprised of representatives from the Corps, EPA, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration, met July 13, 1973, to discuss monitoring of the New London site. The August, 1973 Addendum to the Revised Draft EIS which completely reversed the Navy's prior position on siting criteria for spoil disposal placed its greatest emphasis on the justification that the Scientific Advisory Committee had recommended the New London ground (A. 404-405:

"In addition, the Connecticut Department of Environmental Protection, the University of Connecticut and U.S. Navy scientists were consulted regarding details of the Plan. The Committee made the following recommendations:
a. That the New London Dumping Ground ... should be the primary disposal site.

...

Conclusion

The Navy concurs with the Committee recommendations ..."

In fact this statement was a complete distortion to the public of the role of the Scientific Advisory Committee -- a distortion which was kept intact and repeated continually in the Final EIS (Plaintiffs' Exh. 6A pp. 187-215):

"The [Navy's final] EIS states that the Scientific Advisory Sub-committee recommended the New London Dumping ground. That statement is false and we [the Army] advised the Navy of it ... In fact, the use of the New London Dumping Ground was a recommendation which we presented to the Scientific Advisory Sub-committee."

Moreover, the "recommendation" of the Subcommittee was not even based on environmental or scientific considerations (A. 363, 299-303, 36). Those considerations of the Subcommittee which pushed the New London site to the forefront were, in actuality, almost completely political and economic in nature. The Addendum was issued to the public 3 months after the Revised Draft (EIS)

leaving very little time for public preparation of comments.

If such subversive functioning of federal agencies is to be viewed as solely a "harmless substantive error" as it has been characterized by the District Court (A. 100, 103) there is little hope for meaningful invocation of NEPA procedures in future cases.

The purpose of developing a complete and accurate EIS is in great part to allow for meaningful comment by other federal agencies and of course the public. An EIS is not to be a shield to deflect or neutralize public comment. It is to be a source of factual information upon which decision-makers can depend in formulating their conclusions and a document in the context of which decisions made can be reviewed. Calvert Cliffs Coordinating Committee v. AEC, supra, 449 F. 2d at 1114; Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 759 (E.D. Ark. 1971). The inclusion of these erroneous passages regarding the subcommittee's participation poisoned the EIS. The full disclosure mandated by the statute is designed not only to allow proper review as a basis for a decision by the federal agency but also to elicit appropriate comment from the public. 42 U.S.C. § 4332(2)(c)(v). Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693, 697 (2d Cir., 1972). If the subcommittee's justification for the new site selection was

based on other than environmental criteria, then that should have been explicitly set forth in both the Addendum to the Revised Draft EIS and the final EIS as well. The Navy violated the full disclosure requirements of NEPA by having done otherwise.

C. The change in site selection from Brenton Reef to New London was made without supportive data and was in fact contrary to the then available environmental analyses of the two sites. As such the decision violated the NEPA procedural mandate in that the decision came first with EIS drafting subsequently becoming a mere technicality for the federal agency.

The goal of EIS drafting and comment solicitation is to insure that decision-makers receive full information about a project before any decisions have been made. These procedures are meaningful only if followed in sequence. City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y., 1973).

In the present case the change in site selection was tainted from the beginning by the lack of sufficient scientific information in support of the New London grounds. The defect was never corrected by a convincing revision of the EIS for the project. In the Revised Draft statement the selection of Brenton Reef was justified as follows (A 381):

> "1.08. Spoil Disposal. Upon a thorough investigation of alternatives to the proposed project and alternative disposal

methods, dumping of the spoils in ocean areas has been determined to be the most feasible and least environmentally disruptive method to accomplish the proposed action. Of the alternative ocean dumping sites, areas of containment seem to be the most prudent in light of the state of knowledge of the impacts to the marine ecosystem. Of the several containment sites, the most environmentally suited for the material to be disposed of is the previously spoiled dump site in Rhode Island Sound shown on Figure 3. Between 1967 and 1970 a total of 8.2 million cubic yards of dredge spoil was deposited and monitored in the site ... "

In the Final EIS issued, as we have seen, subsequent to the Army's insistence on the New London site, the corresponding justification paragraph read as follows (A 409):

"1.08. Spoil Disposal. Upon a thorough investigation of alternatives to the proposed project and alternative disposal methods, dumping of the spoils in ocean areas has been determined to be the most feasible and least environmentally disruptive method to accomplish the proposed action. Of the alternative ocean dumping sites, areas of relative containment seem to be the most prudent in light of the state of knowledge of the impacts to the marine ecosystem. Of the several relative containment sites, the most environmentally suited for the material to be disposed of is the previously spoiled dump site in Long Island Sound shown on Figure 3. The dump site has been used historically for disposal of an annual average of about 300,000 cubic yards of material for approximately the last 20 years ... " (emphasis supplied).

Consistent with the underscored revisions, those paragraphs concerning the poor disposal characteristics of Long Island Sound were omitted. The Revised Draft had pointed out that the Navy's own studies showed the Sound to be a poor disposal area (A 381).

The Revised Draft stated as follows (Plaintiffs' Exh. 4, p. 83):

> "The net effect of these [current patterns] is that Long Island Sound is a poor disposal area. Current patterns tend to retain pollutants in the Sound and gradually move them shoreward."

This paragraph was simply deleted from the Final EIS after the reversal in site selection was made. Even the Navy's own study which was included in the final EIS admitted an overall net movement toward the nearby fish and shellfish nursery areas in the Sound and further admitted prior dispersal of pollutants from the area (A 452-53). Studies evidencing containment at Brenton Reef were cited with approval several times in the Revised Draft EIS (A. 378-379, Plaintiffs' Exh. 4, p. 8, 113). Yet the fact that this site was a <u>proven</u> containment site and, as stated in the Revised Draft, "the most environmentally suited for the material to be disposed of," was completely disregarded when the new designation was made (A. 381).

The EIS was treated as a simple "form" for environmental justification in which the "author" filled in the blanks. The Final EIS was prepared and issued merely as a point of empty procedure. But "NEPA does not contemplate that the decision to proceed with the project to be first made by the officials involved, subsequent to which the EIS is prepared as a mere technicality in fulfillment of the statute." Life of the Land v. Brinegar, 485 F. 2d 460, 466 (9th Cir., 1973). This comports to the CEQ guidelines for the preparation of impact statements:

> "In particular, agencies should keep in mind that such statement are to serve as a means of assessing the environmental impact of proposed agency actions, rather than as justification for decisions already made. This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." 40 CFR § 1500.7(a) (1973) (emphasis supplied).

See also Daly v. Volpe, 350 F. Supp. 252, 259 (W.D. Wash., 1972). The evidence brought out in the course of the evidentiary proceedings showed the Army to have made its site selection by June 27, 1973 (A. 497-501). At this juncture, however, there was no data to support such a choice; indeed New London had not even been considered in the Revised Draft EIS.

In Mr. Andreliunas' memorandum of June 27, 1973 (A. 499-500) it was candidly admitted that the choice had been made on "rather sketchy information regarding sediment transport" and in fact "was based on economics." The "significant point of decision" was reached prior to actual compliance with NEPA and the rest was after-the-fact rationalization.

IV

THE CONSIDERATION OF ALTERNATIVE DUMPING SITES DID NOT APPROACH THE LEVEL OF ADEQUACY MANDATED BY NEPA

The "linchpin" provision of NEPA is of course, the requirement that alternatives to particular actions be given thorough study and detailed description so as to afford a basis for the comparison of the problems involved with the proposed project and the difficulties involved with the alternatives. Monroe County Conservation Council v. Volpe, supra, 472 F. 2d at 697-698; Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (D.C. Cir., 1972); Greene County v. FPC, supra, 455 F. 2d 412. This Court in Monroe County, supra, noted the CEQ Guideline -- "A vigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential." 472 F. 2d at 698, note 3. Conversely, conclusory examination of alternatives in an

uninformative manner renders an EIS fatally defective. I-291 WHY? Ass'n v. Burns, 372 F. Supp. 223, 249 (D. Conn., 1974).

Here, consideration of alternative sites was treated by the Navy in 1 1/2 pages out of a two volume EIS. Two of the three sites were rejected by the Navy because it concededly lacked sufficient information about the environmental impacts to be incurred should the spoil be dumped at these sites. The District Court discussed at length the Navy's obligation to develop and consider information about "these sites or any other sites in Long Island Sound." (A88) The Court notes that the EPA did not allow specification of sites in the Sound until mid-1973 and that six months later the Final EIS recommending New London was released. The District Court here noted that "Given this chronology, [under which the statement was prepared], it is not at all surprising that the Navy lacked data on alternative disposal sites within Long Island Sound" (A88).

It should be made clear that site 3, southeast of Fisher's Island, contrary to the District Court's impression, is not located in Long Island Sound. The Navy's obligation to start considering these sites in greater detail did not suddenly arise in mid-1973. Site 3, which is comprised of the "deep holes" southeast of Fishers Island, was dropped rather abruptly

because of inadequate data. The Army had directed the Navy to study such sites as far back as 1971, but the Navy failed to do so (Plaintiffs' Exh. 6B, "App. H," p. 2,). The Navy then had not "legitimately excluded these alternative sites from consideration until mid-1973" as the lower court found (A. 89).

The District Court conceded, as it had to, that the Navy was required to fully comply with NEPA's mandates as to consideration of alternatives. But it arbitrarily concluded that the "rule of reason" set forth in Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 supra, sanctioned the failure of the Navy to adequately consider the alternate sites which are free of the hazards posed by the site actually chosen.

The court in NRDC v. Morton held (p. 837-838):

> "the requirement as to alternatives is subject to a construction of reasonableness, and we say this with full awareness that this approach necessarily has both strengths and weaknesses."

This construction, devised to avoid absurd results, in no way replaces or modifies NEPA's stringent demands. There was nothing reasonable about ignoring site 3. As the court held in Scientists' Institute for Public Information, Inc. v. AEC, supra, 481 F. 2d 1079 at 1092.

> "[I]mplicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to 'the fullest extent possible.'"

The fact is that site 3, southeast of Fisher's Island, was never a "remote" or "speculative" alternative, that the Navy had sufficient time and forewarning to study the ramifications of its use, and that to subject the cursory treatment given to that alternative to a "rule of reason" is an inappropriate application of that rule precluding what might otherwise be incisive judicial review of inadequate compliance with NEPA procedures.

There being no urgency to continue with the second section of the Navy's Thames River spoil disposal project as presently planned, this Court should direct the District Court to enjoin that project pending new environmental review and impact statement preparation by the Army Corps of Engineers. Such a review and statement should consider all alternatives to the project fully as well as consider the cumulative impacts of the dumping of Navy spoil in conjunction with related projects or projects for which the Navy dumping may constitute a precedent.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND THE DISTRICT COURT DIRECTED TO ENTER JUDGMENT ENJOINING THE DEFENDANTS FROM PROCEEDING PENDING PROPER COMPLIANCE WITH THE STATUTES.

Dated: New York, New York
March 11, 1975

Respectfully submitted,

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ROSE ANN BATTISTA , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for Intervenor, State of New York herein. On the 12th day of March , 1975, s he served the annexed upon the following named person :

Kathryn A. Oberly
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Washington, D.C. 20530

Attorney in the within entitled action by depositing ~~xx~~ two copies / true and correct ~~xxxxx~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address~~xx~~ within the State designated by her for that purpose.

Rose ann Battista

Sworn to before me this
12th day of March , 1975

Assistant Attorney General
of the State of New York